

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIA POWELL KELLER-MCINTYRE,

No. C-06-3209 MMC

Plaintiff,

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT;  
VACATING HEARING**

v.

SAN FRANCISCO STATE UNIVERSITY,

Defendant

(Docket No. 141)

Before the Court is defendant's motion for summary judgment, filed December 29, 2006. Plaintiff has filed opposition to the motion, and, with permission of the Court, a supplemental opposition. Defendant has filed a reply, as well as various objections to evidence. Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for resolution without oral argument, see Civil L.R. 7-1(b), hereby VACATES the March 2, 2007 hearing, and rules as follows.

**BACKGROUND<sup>1</sup>**

Plaintiff Julia Keller-McIntyre was diagnosed with mild schizophrenia in the late 1970s, and has been in treatment and on medication for that condition for "most of the time" since her diagnosis. (See Plaintiff's Appendix in Opposition to Defendant's Motion for

<sup>1</sup> The following background section sets forth the evidence in the light most favorable to plaintiff. The source of the evidence has, in each instance, been identified; to the extent the Court has relied on evidence attributed to defendant, plaintiff has cited no evidence to the contrary. Although defendant disputes much of the evidence submitted by plaintiff, such disputes, with limited exception, are not noted herein.

Summary Judgment (“Pl.’s App.”) Ex. 38 (Keller-McIntyre Decl.) at 1.) After her diagnosis, plaintiff obtained a masters degree in public administration, with a concentration in management, from San Francisco State University (“SFSU”) in 1984. (See id. at 1-2.) Plaintiff began working for SFSU in 1996. (See id. at 2.) She initially worked as an Administrative Office Coordinator (“AOC”) for the Consumer Family Studies/Dietetics Department (“CFSD”) in the College of Health and Human Services (“CHSS”). (See id.) In that position, plaintiff attests, she “performed many administrative and management duties,” including supervising Michael Jensen, a half-time Instructional Support Assistant, for seven years. (See id.)

In 1998, Dr. Nancy Rabolt (“Dr. Rabolt”) became plaintiff’s supervisor. (See id. at 3; see also Defendant’s Exhibits in Support of Motion for Summary Judgment (“Def.’s MSJ Ex.”) Ex. H (Rabolt Decl.) ¶ 3.) That year, plaintiff was awarded a “performance-based salary increase”; in 1999, plaintiff was awarded a performance bonus “in recognition of outstanding performance and contributions made during the 1998-99 fiscal year.” (See Keller-McIntyre Decl. at 3; see also Pl.’s App. Exs. 7 and 9.) In 1999, plaintiff was “given the additional duty of fiscal management for the Vista Room,” (see Keller-McIntyre Decl. at 3), a faculty-managed restaurant on campus where students “obtain practical experiences alongside their food services management courses,” (see Rabolt Decl. ¶ 2). In 2000, plaintiff received a “merit salary increase . . . based on an overall performance evaluation rating that is above satisfactory”; in 2001, plaintiff received an “in-range salary increase” awarded “[i]n recognition of [plaintiff’s] acquired skills, individual merit and competency, and consistent contributions[.]” (See Keller-McIntyre Decl. at 2 and attachment at 000134, 000127.)

Thereafter, plaintiff attests, she “fell out of favor with Dr. Rabolt” and received two years of average evaluations.<sup>2</sup> (See id. at 3.) Dr. Rabolt attests that plaintiff’s “work and

---

<sup>2</sup> In her declaration, plaintiff states Dean Zingale told her he thought the average evaluations were because of a personality conflict and not because of work performance. (See Keller-McIntyre Decl. at 3.) Defendant’s objection to this statement as inadmissible hearsay is sustained.

1 relationships with faculty and staff began to deteriorate” in the 2001 academic year and,  
2 although plaintiff “accomplished tasks satisfactorily, she did not exhibit as much  
3 cooperation with faculty and staff as the department expected of her.” (See Rabolt Decl.  
4 ¶ 4.) In July 2002, according to Dr. Rabolt, a member of the faculty complained that  
5 plaintiff was not appropriately supporting staff at the Vista Room, and a new lecturer  
6 complained that plaintiff was unhelpful in providing new faculty with orientation materials.  
7 (See id. ¶ 5.) Dr. Rabolt further attests that, in October 2002, she received a complaint  
8 from the University’s Parking and Transportation Department about plaintiff’s demeanor  
9 and, in February 2003, plaintiff was involved in “an angry confrontation with one of the  
10 faculty who needed to make changes to the Department’s class schedule.” (See id. ¶ 5.)

11 In the spring of 2003, the Chair Review Committee circulated by email, to all faculty  
12 and staff at CFSD, a report concerning Dr. Rabolt’s performance as chairperson of the  
13 CFSD. (See Rabolt Decl. ¶ 6.) The report contained remarks by a member of the faculty,  
14 who opined that Dr. Rabolt had “very weak” and “dysfunctional office staff.” (See id.; see  
15 also Keller-McIntyre Decl. at 3; Pl.’s App. Ex. 11.) Plaintiff attests she was “shocked and  
16 outraged” and, thereafter, was diagnosed with Post Traumatic Stress Disorder. (See  
17 Keller-McIntyre Decl. at 3-4.) Plaintiff initiated a grievance against the University for libel;  
18 the University complied with plaintiff’s request that the statement be removed from the  
19 review document and that she receive an apology, and, additionally, awarded plaintiff a  
20 10% raise. (See Rabolt Decl. ¶ 6; Keller-McIntyre Decl. at 4; Def.’s MSJ Ex. V (Taylor  
21 Decl.) ¶ 4); Def.’s MSJ Ex. W (Settlement Agreement) ¶ 1.)

22 On April 7, 2003, plaintiff submitted a “Reasonable Accommodation Request Form”  
23 to the Disability Programs and Resource Center (“DPRC”) at SFSU, pursuant to which  
24 plaintiff sought a modified work schedule<sup>3</sup> and a partition around her desk. (See Def.’s  
25 MSJ Ex. R (Chelberg Decl.) ¶ 4 and Ex. S; Keller-McIntyre Decl. at 4.) On April 9, 2003,  
26 the DPRC received a letter from C. Martel Bryant, M.D. (“Dr. Bryant”), stating that he

---

27  
28 <sup>3</sup> Plaintiff submits no further evidence as to the nature of this requested modification  
or the reason therefor.

supported plaintiff's "reasonable accommodation request for a partition around her desk as one effort to protect her functions and respect." (See Chelberg Decl. ¶ 5 and Def.'s MSJ Ex. T at 1.) The DPRC asked Dr. Bryant to provide his diagnosis of plaintiff's disability and his suggestions with respect to how plaintiff's work environment should be restructured in view of plaintiff's disability. (See Chelberg Decl. ¶ 5.) On June 11, 2003, Dr. Bryant submitted a letter stating that plaintiff suffered from "Posttraumatic Stress Disorder Chronic," with "symptoms of disorganization, anxiety and depression when experiencing work-related stress," and opined that "[a]n office space or a divider in her working space would be helpful." (See Chelberg Decl. ¶ 5 and Def.'s MSJ Ex. T at 2.) The DPRC also received a note from James Gabby, M.D. ("Dr. Gabby"), stating that he had diagnosed plaintiff with "Schizophrenia, Residual Type 295.60," and opining that plaintiff could perform her work successfully if she were provided the work environment she had requested. (See Chelberg Decl. ¶ 5.) Although plaintiff testified at her deposition that "three or four faculty," including Dr. Rabolt, "opposed the screen," (see Pl.'s App. Ex. 37 at 122:1-11), the DRPC ultimately approved plaintiff's request for a partition around her desk, (see Chelberg Decl. ¶ 5.)<sup>4</sup>

---

<sup>4</sup> Plaintiff has submitted various statements to the effect that the partition, after it was installed, was unfavorably received by her supervisors and co-workers; defendants' objections to such statements will be sustained as follows:

a. Plaintiff attests that "[s]ome faculty in faculty meetings attacked the screen and Dr. Rabolt mocked [her] use of the partition and led [an] attack to remove it[.]" (See Keller-McIntyre Decl. at 4.) Defendant's objection to the above-referenced statement as conclusory and without foundation is sustained; plaintiff has not set forth sufficient detail to permit a trier of fact to determine what was said or done and whether plaintiff has personal knowledge thereof. See, e.g., Forsberg v. Pacific Northwest Bell Telephone Co., 840 F.2d 1409, 1419 (9th Cir. 1988) (holding "purely conclusory allegations of discrimination, with no concrete, relevant particulars, will not bar summary judgment"); Walker v. Hoffman, 583 F.2d 1073, 1075 (9th Cir. 1978) (holding plaintiff's declaration that he was "harassed" amounts to "nothing more than an unsupported conclusory allegation insufficient to raise a 'genuine issue'" on motion for summary judgment).

b. Plaintiff submits an email from Vicki Anderson, dated April 4, 2003, stating that plaintiff's "screen is . . . being attacked as 'unfriendly,' thanks to the dept. chair making absolutely NO effort to explain why it is there in the first place." (See Pl.'s App. Ex. 13.) Defendant's objection to this exhibit as inadmissible hearsay is sustained.

c. Plaintiff attests in her declaration that "Dean Zingale did not like the screen either." (See Keller-McIntyre Decl. at 4.) Defendant's objection to such statement as conclusory and without foundation is sustained.

d. Plaintiff testified at her deposition that a student assistant told her that he or she

1 On May 16, 2003, Dr. Rabolt requested input from faculty and staff at CFSD about  
2 plaintiff's work performance, for purposes of preparing plaintiff's performance evaluation.  
3 (See Rabolt Decl. ¶ 7.) In response, Dr. Rabolt attests, she received "a number of positive  
4 comments about plaintiff's work" as well as "a significantly greater number of comments  
5 that were very critical of plaintiff," (see id. ¶ 7); based on that feedback, and on her own  
6 observation of plaintiff's work, she "gave plaintiff an average overall performance  
7 evaluation," (see id.).

8 In June 2003, Dean Don Zingale ("Dean Zingale") reassigned plaintiff to the position  
9 of Administrative Office Coordinator of Kinesiology, and reassigned Toan Thai ("Thai"), the  
10 existing Administrative Office Coordinator of Kinesiology to plaintiff's position in the CFSD.  
11 (See Taylor Decl. ¶ 5 and Def.'s MSJ Ex. X.) Plaintiff attests the assignment was made  
12 against her will. (See Keller-McIntyre Decl. at 4.) The current CHHS Dean, Don Taylor  
13 ("Dean Taylor"), attests that he participated in all meetings with Dean Zingale about  
14 plaintiff's reassignment; the reason for the transfer, according to Dean Taylor, was that the  
15 Department of Kinesiology was welcoming a new chairman to the department, Bob Spina  
16 ("Dr. Spina"), who was new to the university, and Dean Taylor and Dean Zingale felt Spina  
17 "would benefit from having an Administrative Office Coordinator of plaintiff's experience  
18 who was familiar with the complexities of the department." (See Taylor Decl. ¶ 5.)

19 On July 14, 2003, plaintiff submitted a second request for a modified work schedule;  
20 she requested therein that she be permitted to work from 7:00 a.m. to 4:45 p.m., Monday  
21 through Thursday, and from 7:15 a.m. to 12:00 p.m. on Fridays. (See Chelberg Decl. ¶ 6  
22 and Def.'s MSJ Ex. U.) Plaintiff attests Dr. Spina "gave [her] so much trouble about [her]  
23 accommodation that [she] dropped it because [she] was afraid of his adverse evaluation  
24 and [she] worked the schedule that he insisted." (See Keller-McIntyre Decl. at 5.) Plaintiff  
25 further attests that Dr. Spina "did modify [her] schedule somewhat but he did not give [her]

26  
27 had overheard Dean Zingale say he did not like the screen around plaintiff's desk. (See  
28 Pl.'s App. Ex. 37 at 124:18-125:13.). Defendant's objection to such statement as  
inadmissible hearsay is sustained.

1 the Friday afternoons [she] needed off for appointments with [her] psychiatrists[.]” (See id.)<sup>5</sup>  
 2 Plaintiff testified at her deposition that although she did not tell Dr. Spina that her requested  
 3 modified work schedule “was necessary because of a psychiatric disability,” she made it  
 4 clear to him that she was requesting the schedule modification as “a disability  
 5 accommodation.” (See Pl.’s App. Ex. 37 at 186:6-187:1.)

6 Immediately after her reassignment, plaintiff attests, Dr. Spina “removed [her]  
 7 supervisory responsibilities.” (See Keller-McIntyre Decl. at 4.) Plaintiff further attests that  
 8 Dr. Spina hired Maria Allain (“Allain”), “would not let [plaintiff] have any role in the selection  
 9 process, although [Allain] was to be the Administrative Support Coordinator reporting to  
 10 [plaintiff] as the ‘office manager,’” and “required Maria Allain to report directly to him.” (See  
 11 id. at 4-5.) According to plaintiff, Dr. Spina “worked closely with Maria Allain and undercut  
 12 [plaintiff],” accused plaintiff of making mistakes she did not make, and “made a big deal of  
 13 problems [she] had” with respect to “securing a chemical one time and of ordering Dell  
 14 computer on another occasion.” (See id. at 5.)

15 Plaintiff further attests that Dr. Spina “gave [her] a negative performance appraisal  
 16 even though [she] accomplished the work in an excellent and timely fashion.” (See id.;  
 17 Def.’s Ex. N (6/28/04 performance evaluation).)<sup>6</sup> In that performance evaluation, Dr. Spina  
 18 rated plaintiff’s performance on the skill of “leading others” at 1 on a scale of 1 to 5. (See  
 19 id.)<sup>7</sup>

---

21 <sup>5</sup> Defendant has submitted evidence that although Dr. Spina initially expressed  
 22 concerns that no one was available to cover plaintiff’s responsibilities in her absence,  
 23 plaintiff’s requested modified work schedule was approved by the DPRC and plaintiff was  
 afforded the modified work schedule she requested. (See Chelberg Decl. ¶ 6; Def.’s MSJ  
 Ex. K (Spina Decl.) ¶ 7.)

24 <sup>6</sup> Dr. Spina attests that plaintiff “had little knowledge of the University’s policies and  
 25 procedures,” “had difficulty with student payroll matters, ordering equipment, and  
 purchasing and reimbursement,” “did not demonstrate much initiative,” and made “a large  
 number of mistakes . . . on simple tasks.” (See Spina Decl. ¶ 8.)

26 <sup>7</sup> Plaintiff’s expert, Gerald V. Barrett (“Dr. Barrett”), attests that plaintiff’s job  
 27 description provides, in Dr. Barrett’s words, that plaintiff has “no responsibility for leading  
 28 others,” (see Pl.’s Supp. Opp. Ex. 41 at 9 and Ex. P), and, consequently, “should not have  
 been rated on her June 2004 performance evaluation for ‘leading others,’” (see id. at 10.)  
 Dr. Barrett relies on a university-wide job description for the position of “Administrative



Plaintiff attests that Dr. Spina requested she be reassigned, and that she also wanted to be reassigned, to another position. (See id. at 6; see also Taylor Decl. ¶ 6.) Dean Taylor attests that he met with plaintiff in the summer of 2004 to discuss her interests, in order to determine where she could be reassigned. (See Taylor Decl. ¶ 7.) Dean Taylor further attests that, on September 13, 2004, he “temporarily reassigned plaintiff to the [CHHS] Office as an Administrative Analyst, Specialist, under Ryziard Dziadur [“Dziadur”], the Director of Operations/Controller,” because Dziadur needed short-term assistance. (See Taylor Decl. ¶ 7.) Plaintiff attests she “was given the duty of coordination and note taking for the Gerontology Task Force Committee and this was [her] only real duty besides that of scholarships.” (See Keller-McIntyre Decl. at 6.) Plaintiff attests she had “virtually nothing to do.” (See id.) Plaintiff further attests Dean Taylor and Dziadur “opposed [her] accommodation work schedule, but Gene Chelberg, Disability Director supported it.” (See id.)

In the Fall of 2004, Jason Katz (“Katz”) was hired to manage SFSU’s Student Resource Center (“SRC”). (See Taylor Decl. ¶ 8.) Dean Taylor attests that Katz requested a full time coordinator to serve as a receptionist and to help with the paperwork around the office. (See id.) Dean Taylor further attests he felt it would be an appropriate assignment for plaintiff because she had “expressed an interest in assessment work,” and, on January 1, 2005, reassigned plaintiff to work as an Administrative Office Coordinator in the SRC under Katz. (See id.) According to Katz, plaintiff’s position in the SRC “is a non-management position that supports the administrative functions of the [SRC] . . . and is not a counseling position.” (See Def.’s MSJ Ex. DD (Katz Decl.) ¶ 3.)<sup>8</sup>

---

Analyst/Specialist,” however, and not on the job description prepared by Dr. Spina specifically to describe plaintiff’s duties; the job description prepared by Dr. Spina expressly provides that plaintiff had the duty to “[s]upervise student assistants in conjunction with the Academic Support Coordinator.” (See Spina Decl. ¶ 5 and Ex. L.)

<sup>8</sup> Plaintiff attests that in her new position at the SRC, “[t]here were no real duties for [her] to perform” and that, although Katz included various duties in her job description, “he excluded [her] from their performance.” (See Keller-McIntyre Decl. at 7.) Defendant’s objection to this evidence as without foundation is sustained. The statements are too conclusory and the only facts submitted by plaintiff in support thereof is that one particular

1        Shortly after plaintiff was reassigned to the SRC, plaintiff complained to Dean Taylor  
 2        “about working for a younger man with little management experience.” (See Taylor Decl.  
 3        ¶ 9.)<sup>9</sup> Katz is 35 years old and has a graduate degree in counseling, (see Def’s MSJ Ex. E  
 4        (Katz Dep.) at 6:9-24); he does not have a degree in management, (see Pl.’s App. Ex. 23  
 5        (Katz Dep.) at 15:14-17), and had no prior experience supervising staff at SFSU with the  
 6        exception of supervising “student assistants and counseling interns,” (see Def.’s MSJ Ex. E  
 7        (Katz Dep.) at 8:9-24). Dean Taylor attests that Katz was hired as the Coordinator of the  
 8        SRC “because he had a master’s degree in counseling, with a specialization in school  
 9        counseling, and because he had already worked at the University as an academic  
 10        counselor”; according to Dean Taylor, Katz’s “background, education and training matched  
 11        the particular needs of a coordinator of the [SRC].” (See Taylor Decl. ¶ 9.) As Coordinator,  
 12        Katz “manage[s] the operations of the [SRC] and perform[s] and supervise[s] all career  
 13        counseling, personal counseling and student assessment” for the SRC. (See Def.’s MSJ  
 14        Ex. DD (Katz Decl.) ¶ 1.)

15        Dean Taylor further attests that the SRC was experiencing increased foot traffic and  
 16        that he felt it was important for the SRC to be available to students at all times during the  
 17        work week. (See Taylor Decl. ¶ 10.) Consequently, Dean Taylor attests, he “raised the  
 18        issue of plaintiff not working a full day on Fridays,” but after consultation with the DPRC,  
 19        permitted plaintiff “to keep her modified work schedule, and to take Friday afternoons off.”  
 20        (See id. ¶ 10.)

21        In February 2005, plaintiff asked Katz and Dean Taylor if “she might be able to  
 22        interpret assessment reports generated by the Myers Brigg Type Indicator” (“MBTI”). (See  
 23        Taylor Decl. ¶ 11; Katz Decl. ¶ 4.) Dean Taylor attests he told plaintiff “she was not

---

24        \_\_\_\_\_  
 25        set of files was already being handled by student assistants at the time of her arrival and  
 26        continued to be handled by them. (See Keller-McIntyre Decl. at 7.) Additionally, Katz  
 27        attests plaintiff had “significant responsibilities” and itemizes numerous specific duties for  
 28        which plaintiff was responsible. (See Katz Decl. ¶ 5.)

<sup>9</sup> Although the Court has not located plaintiff’s precise age in the record, she stated  
 in responses to interrogatories that she is “20 years” older than Katz. (See Def.’s MSJ Ex.  
 C at 11:8-9.)



1 qualified to interpret MBTI reports” because “[t]he MBTI is a psychological instrument tool  
2 that requires a degree or advanced study in counseling psychology,” which plaintiff lacks.  
3 (See Taylor Decl. ¶ 11.) Katz attests he suggested to plaintiff that she “consider taking a  
4 counseling course at the University to familiarize herself with various assessment tools so  
5 that she may be more able to administratively assist [him] with [his] counseling  
6 responsibilities,” but further informed her that “career counseling and similar assessment  
7 duties” were his areas of responsibility and were not part of plaintiff’s job. (See Katz Decl.  
8 ¶ 4.)

9 Plaintiff submits evidence that she thereafter completed and received an A- in a  
10 counseling course titled Assessment in Counseling, which was described in the SFSU  
11 course catalog as involving the “[c]linical process of testing” including the “ability to clinically  
12 analyze and interpret assessment instruments, including diagnostic tests for various  
13 counseling specializations.” (See Keller-McIntyre Decl. at 9; Pl.’s Supp. Opp. Ex. 41  
14 (Barrett Decl.) at 27 and Ex. H at 2 and Ex. I.) According to plaintiff’s expert, Dr. Barrett,  
15 plaintiff’s completion of that course qualified her to administer and interpret the MBTI. (See  
16 Pl.’s Supp. Opp. Ex. 41 at 28 and Ex. J (providing “[q]ualification” to use MBTI “is granted  
17 to those who . . . have a minimum of a bachelor’s degree” and “successful completion of a  
18 course in the interpretation of psychological assessments and measurement at an  
19 accredited college or university”). Nonetheless, plaintiff attests, Dean Taylor and Katz  
20 “inaccurately maintained that [she] had to have a degree in Counseling to do any work in  
21 the area[.]” (See Keller-McIntyre Decl. at 9.)

22 On July 6, 2005, Katz gave plaintiff an “average overall performance evaluation.”  
23 (See Katz Decl. ¶ 10 and Def.’s MSJ Ex. FF.) In particular, Katz stated therein that plaintiff  
24 “is very professional and organized on her job,” “assists her supervisor when he requires it  
25 and is willing to help him in his duties,” “has made a special point of communicating with  
26 her supervisor . . . to find out what he wants her to do and then to do it in the way he  
27 wants,” and “acts in a professional, courteous and civil way promoting satisfactory  
28 interactions with coworkers, students and her supervisor.” (See Def.’s MSJ Ex. FF at 1-2.)

1 Katz also stated therein, however, that plaintiff “has yet to demonstrate proficient practical  
2 knowledge of MS [Microsoft] Office Applications,” “has yet to perform at a level one would  
3 expect given her years of experience at SFSU and level of education,” and “has yet to  
4 demonstrate her knowledge of University/College/SRC policies and procedures,” (See id. at  
5 1-2.) Katz further stated therein that “[a]reas where [plaintiff] does not meet expectations  
6 and must continue to improve upon include her knowledge and practical skills in areas  
7 related to the administrative functions of the SRC including: the proficient use of MS Office  
8 Suite applications including Outlook; the practical application of SRC policies and  
9 procedures and their effect on both faculty, staff, and students; and demonstrating  
10 independence and initiative in regard to the day to day functioning of the office.” (See id. at  
11 3.)<sup>10</sup>

12 On October 4, 2005, Katz distributed an email to SRC staff, advising them that  
13 studying was inappropriate during work hours. (See Katz Decl. ¶ 11 and Def.’s MSJ Ex.  
14 GG.) Two days later, Katz attests, he noticed plaintiff studying in her cubicle and reminded  
15 her that she was not to study during work hours. (See Katz Decl. ¶ 11.) According to Katz,  
16 plaintiff “responded by arguing that she could properly study during work hours because (a)  
17 she was taking a course in assessment which she asserted was 30% of her job duties, (b)  
18 she should not be doing student assistant work, and (c) her last performance evaluation  
19 was unfair.” (See id.) Katz attests that he suggested that he and plaintiff meet to review  
20 the functions of her job and “expressed [his] concern over her hostility towards [him] since  
21 receiving her performance evaluation.” (See id.)

22 On October 11, 2005, plaintiff filed a complaint with the Equal Employment  
23 Opportunity Commission (“EEOC”), alleging SFSU had discriminated against her on the  
24 basis of her sex, age, and disability because (1) Dean Taylor denied her request to perform  
25

---

26 <sup>10</sup> Katz further attests that plaintiff “has not performed [her responsibilities] on a  
27 regular basis” and “has refused to perform tasks” that did not consist of “higher  
28 administrative management duties and counseling work.” (See Katz Decl. ¶ 6.) Plaintiff  
attests that she has “never refused to do any work,” although she concedes that she “did  
try to delegate some work.” (See Keller-McIntyre Decl. at 7-8.)

1 MBTI assessments, (2) Katz gave her a “lower performance evaluation,” (3) she was “given  
2 lesser job assignments and excluded from meetings” and was “excluded from training  
3 student assistants,” and (4) Katz “harassed” her by telling her she could not study during  
4 work hours. (See Keller-McIntyre Decl. at 8 and Pl.’s App. Ex. 40; see also Pl.’s Supp.  
5 Brief Ex. 42 (Keller-McIntyre Supp. Decl.) ¶ 1.)

6 According to plaintiff, “the very next day” after she filed her EEOC complaint, “Dean  
7 Taylor called [her] into his office and berated [her] for an hour,” called her a “paranoid  
8 schizophrenic,” and told her that her “work was substandard, and that [she] was incapable  
9 of higher administrative and management work.” (See Keller-McIntyre Decl. at 8; Keller-  
10 McIntyre Supp. Decl. ¶ 2.) Plaintiff further attests that Dean Taylor told her that the “idea of  
11 [her] doing such administrative and management work was ‘ludicrous,’ and that if [she]  
12 ‘didn’t know what the word meant, to look it up in the dictionary.’” (See Keller-McIntyre  
13 Decl. at 8.)

14 Katz attests that on the following date, October 13, 2005, he sent Dean Taylor an  
15 email “requesting a change in plaintiff’s job description as well as a relocation of her work  
16 station” because plaintiff “was acting insubordinate and hostile and put little effort at  
17 greeting students.” (See Katz Decl. ¶ 12 and Def.’s MSJ Ex. HH.) According to Katz,  
18 recent “exit surveys of students who visited the Student Resource Center showed that only  
19 60% of them believed they had been greeted promptly, a figure that was down from 91% in  
20 all previous years.” (See Katz Decl. ¶ 12.) Thereafter, Katz attests, he met with Dean  
21 Taylor to discuss his concerns about plaintiff, and Dean Taylor authorized Katz to revise  
22 plaintiff’s job description and to move her work station into a different part of the office.  
23 (See Katz Decl. ¶ 13.) Katz further attests that, in plaintiff’s revised job description, he  
24 “removed plaintiff’s responsibility to supervise, hire and train student assistants, and her  
25 responsibility to liaise with student associations.” (See *id.*)

26 Subsequently, in an internal memorandum to plaintiff dated October 18, 2005, Dean  
27 Taylor stated that he had “asked Jason Katz to immediately change the location of  
28 [plaintiff’s] workstation and to make appropriate changes to the Essential Job Functions of

1 [her] job description” because plaintiff had “demonstrated insubordinate and hostile  
2 behaviors when given time sensitive tasks” and because a recent survey had shown a 30%  
3 drop in the number of students who felt they were greeted promptly when they visited the  
4 SRC. (See Keller-McIntyre Decl. at 8; Pl.’s App. Ex. 31.)

5 On January 1, 2006, plaintiff’s workstation was moved into a conference room in the  
6 SRC. (See Katz Decl. ¶ 14.) Plaintiff testified at her deposition that having her own office  
7 “gave [her] privacy” and “just worked perfectly in terms of [her] mental health.” (See Def.’s  
8 MSJ Ex. D (Keller-McIntyre Dep.) at 136:2-14.) Plaintiff further testified, however, that  
9 although she “love[s]” her office, the wall of the office has a “graphic” that “looks like a lamb  
10 chipped into the wall biting a butterfly’s wing.” (See id. at 225:7-25; Keller-McIntyre Decl. at  
11 10-11.) Plaintiff attests that “[t]his representation made [her] very upset and traumatized by  
12 its symbolic meaning[.]” (See id. at 11.) Katz attests that, on August 1, 2006, he asked the  
13 University to paint over the “graphic,” which he describes as “chipped paint.” (See Katz  
14 Decl. ¶ 14.)

15 Over the past three years, plaintiff has applied for several other positions at the  
16 University. (See Def.’s MSJ Ex. PP(Czaja Decl.) ¶ 4.) James Czaja, Director of Employee  
17 Relations for the Human Resources Department at SFSU, attests that plaintiff was not  
18 hired for any of those positions because “[s]he either did not meet the minimum  
19 qualifications for those positions, or because other more qualified individuals were hired to  
20 fill those positions.” (See id.)

21 On December 11, 2006, plaintiff attests, she was placed on administrative leave  
22 because she was “deemed ‘incapable of working.’” (See Keller-McIntyre Decl. at 10.)  
23 Plaintiff attests she was told not to report to work on Monday, December 11, 2006, and that  
24 she “did not report to work and [is] now at home.” (See id.) Plaintiff further attests that  
25 Paul B. Carlat, M.D. (“Dr. Carlat”) has provided her with a note, dated December 20, 2006,  
26 stating that she “is able to function adequately in a work situation.” (See id.; see also Pl.’s  
27  
28

1 App. Ex. 36.)<sup>11</sup> Additionally, Dr. Bryant, at his December 20, 2006 deposition, testified that  
 2 plaintiff “certainly can perform [her] job” and that he had no reason to believe that she could  
 3 not continue to work as she had for the past ten years. (See Pl.’s App. Ex. 39 (Bryant  
 4 Dep.) at 69:17-70:7, 71:5-8.)<sup>12</sup>

## 5 LEGAL STANDARD

6 Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment as  
 7 to “all or any part” of a claim “shall be rendered forthwith if the pleadings, depositions,  
 8 answers to interrogatories, and admissions on file, together with the affidavits, if any, show  
 9 that there is no genuine issue as to any material fact and that the moving party is entitled to  
 10 judgment as a matter of law.” See Fed. R. Civ. P. 56(b), (c). Material facts are those that  
 11 may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
 12 248 (1986). A dispute as to a material fact is “genuine” if the evidence is such that “a  
 13 reasonable jury could return a verdict for the nonmoving party.” See id. The Court may not  
 14 weigh the evidence. See id. at 255. Rather, the nonmoving party’s evidence must be  
 15 believed and “all justifiable inferences must be drawn in [the nonmovant’s] favor.” See  
 16 United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989)  
 17 (en banc) (citing Liberty Lobby, 477 U.S. at 255).

18 The moving party bears the initial responsibility of informing the district court of the  
 19 basis for its motion and identifying those portions of the pleadings, depositions,  
 20 interrogatory answers, admissions and affidavits, if any, that it contends demonstrate the  
 21 absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317,

---

22  
 23 <sup>11</sup> Defendant’s hearsay objection to the note from Dr. Carlat is sustained.

24 <sup>12</sup> Defendant’s objection to the above-referenced testimony of Dr. Bryant on the  
 25 ground that Dr. Bryant is not plaintiff’s treating physician, has made no current diagnosis of  
 26 her, and therefore is not competent to offer a medical opinion as to whether she is capable  
 27 of working is overruled. Such objections go to the weight of the evidence, rather than its  
 28 admissibility; Dr. Bryant testified that although his opinion was “not based on a current  
 diagnosis of plaintiff’s medical condition,” it was based “on the experience that we have had  
 in recent years.” (See id. at 70:3-7, 70:19-23.) Plaintiff testified at her deposition that  
 although Dr. Bryant is not her “primary doctor,” she has seen him three or four times a year  
 since 1995. (See Pl.’s App. Ex. 37 at 98:1-21.) Defendant cites no evidence suggesting  
 plaintiff had significantly deteriorated during 2006.

323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party's burden is discharged when it shows the court there is an absence of evidence to support the nonmoving party's case. See id. at 325.

A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." See Fed. R. Civ. P. 56(e); see also Liberty Lobby, 477 U.S. at 250. The opposing party need not show the issue will be resolved conclusively in its favor. See Liberty Lobby, 477 U.S. at 248-49. All that is necessary is submission of sufficient evidence to create a material factual dispute, thereby requiring a jury or judge to resolve the parties' differing versions at trial. See id.

The Ninth Circuit repeatedly has held that the district court is not required to comb through the record sua sponte in search of evidence that would preclude summary judgment. See Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) ("It is not our task, or that of the district court to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment."); see also Carmen v. San Francisco Unified School District, 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found.")

## DISCUSSION

Plaintiff asserts causes of action alleging employment discrimination, retaliation, and harassment on the basis of sex, age, and disability, in violation, respectively, of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Defendant now moves for summary judgment with respect to all causes of action.

### A. Sex and Age Discrimination Claims

Plaintiff's sex and age discrimination claims are based on the contention that she



1 “was forced to work outside her classification and in a lower work status,<sup>13</sup> under Mr. Katz,  
 2 whose credentials were inferior to those of Plaintiff,” (see Opp. at 24:25-25:1), as well as  
 3 Dean Zingale’s decision to reassign the positions of plaintiff and an assertedly younger  
 4 male, Thai, with the result that plaintiff was given Thai’s job in the Kinesiology department  
 5 and Thai was given plaintiff’s job in the CDSH, (see Supp. Opp. at 5:8-10).

6 To state a prima facie case of sex discrimination, plaintiff must show “(1) she  
 7 belongs to a protected class, (2) she was performing according to her employer’s legitimate  
 8 expectations, (3) she suffered an adverse employment action, and (4) other employees  
 9 with qualifications similar to her own were treated more favorably.” See Bergene v. Salt  
 10 River Project Agricultural Improvement and Power District, 272 F.3d 1136, 1140 (9<sup>th</sup> Cir.  
 11 2001). To state a prima facie case of age discrimination, plaintiff must show she “(1) was a  
 12 member of the protected class [age 40-70]; (2) was performing [her] job in a satisfactory  
 13 manner; (3) was discharged [or otherwise subject to an adverse employment action]; and  
 14 (4) was replaced by a substantially younger employee with equal or inferior qualifications,”  
 15 or that similarly situated persons outside her protected class were treated more favorably.  
 16 See Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9<sup>th</sup> Cir. 1990). Alternatively, plaintiff  
 17 may submit “direct evidence of discriminatory intent.” See Godwin v. Hunt Wesson, Inc.,  
 18 150 F.3d 1217, 1220 (9<sup>th</sup> Cir. 1998).

19 If plaintiff satisfies her initial burden, the burden then shifts to defendant to  
 20 produce evidence of “a legitimate, nondiscriminatory reason” for the adverse employment  
 21 action. See Bergene, 272 F.3d at 1140. If the employer does so, the plaintiff must “show  
 22 that the articulated reason is pretextual, either directly by persuading the court that a  
 23 discriminatory reason more likely motivated the employer or indirectly by showing that the  
 24 employer’s proffered explanation is unworthy of credence.” See Chuang v. University of  
 25 California Davis Board of Trustees, 225 F.3d 1115, 1124 (9<sup>th</sup> Cir. 2000).

### 26 **1. Katz Assignment**

27  
 28 <sup>13</sup> Plaintiff’s expert, Dr. Barrett, concedes that plaintiff’s “title remained the same for  
 each job position at SFSU.” (See Barrett Decl. at 11.)

1 Assuming, arguendo, plaintiff has established a prima facie case of sex and age  
 2 discrimination as a result of her assignment to work under Katz, defendant has articulated  
 3 legitimate, nondiscriminatory reasons for that assignment. In particular, Dean Taylor  
 4 attests that Katz had relevant experience that plaintiff lacked, specifically, a master's  
 5 degree in counseling with a specialization in school counseling and experience as an  
 6 academic counselor. (See Taylor Decl. ¶ 9.) Additionally, Dean Taylor attests that he felt  
 7 the job would be an appropriate assignment for plaintiff because "she had expressed an  
 8 interest in assessment work." (See id. ¶ 8.) Plaintiff has submitted no evidence suggesting  
 9 that the proffered reason for her assignment to work under Katz was a pretext for sex or  
 10 age discrimination.

11 Accordingly, the Court will grant defendant's motion for summary judgment with  
 12 respect to plaintiff's claim that she was discriminated against because of her sex and age  
 13 by being assigned to work under Katz.

## 14 **2. Kinesiology Assignment**

15 Assuming, arguendo, plaintiff has established a prima facie case of sex and age  
 16 discrimination as a result of Dean Zingale's decision to reassign plaintiff and Thai to each  
 17 other's positions in June 2003, defendant has articulated a legitimate, nondiscriminatory  
 18 reason for that assignment. In particular, Dean Taylor attests that the Department of  
 19 Kinesiology had a new chairman, Dr. Spina, who was new to the university, and Dean  
 20 Taylor and Dean Zingale thought Dr. Spina "would benefit from having an Administrative  
 21 Office Coordinator of Plaintiff's experience who was familiar with the complexities of the  
 22 department." (See Taylor Decl. ¶ 5.) Additionally, Dean Zingale's memorandum  
 23 announcing the reassignment states that plaintiff, "as a veteran AOC with experience in a  
 24 complex department, has the potential to be a key component in [Dr. Spina's] success,  
 25 particularly as it relates to dealing with specialized facilities." (See Def.'s MSJ Ex. X at 1.)

26 In response, plaintiff argues that her becoming a "key component" in Dr. Spina's  
 27 success "of course, never happened . . . [and] was never intended to happen." (See Supp.  
 28 Opp. at 5:13.) Plaintiff submits no evidence, however, suggesting that the proffered reason

1 for her transfer was a pretext for sex or age discrimination.

2 Accordingly, the Court will grant defendant's motion for summary judgment with  
3 respect to plaintiff's claim that she was discriminated against because of her sex and age<sup>14</sup>  
4 by being assigned to work in the Department of Kinesiology.

### 5 **B. Disability Discrimination Claims**

6 Under the ADA, "[n]o covered entity shall discriminate against a qualified individual  
7 with a disability because of the disability of such individual in regard to . . . the hiring,  
8 advancement or discharge of employees, employee compensation, job training, and other  
9 terms, conditions, and privileges of employment." See 42 U.S.C. § 12112(a). To state a  
10 prima facie case of discrimination in violation of the ADA, plaintiff must show (1) she is a  
11 disabled person within the meaning of the ADA, (2) she is a qualified individual, which  
12 requires that she be able to perform the essential functions of her job, with reasonable  
13 accommodation if necessary; and (3) her employer either failed to reasonably  
14 accommodate her disability or subjected her to an adverse employment action because of  
15 her disability. See Allen v. Pacific Bell, 348 F.3d 1113, 1114 (9th Cir. 2003); Nunes v. Wal-  
16 Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999).

17 Here, there is no contention in defendant's memoranda that plaintiff does not suffer  
18 from schizophrenia, that her condition is not disabling, or that she could not perform the  
19 essential functions of her various positions.

#### 20 **1. Reasonable Accommodation**

21 With respect to reasonable accommodation, it is undisputed that defendant provided  
22 plaintiff with the requested partition around her desk. There is a triable issue, however, as  
23 to whether Dr. Spina discriminated against plaintiff by refusing to permit her to work the  
24 modified schedule she requested as an accommodation for her disability. As noted,  
25 plaintiff requested that she be permitted to work from 7:00 a.m. to 4:45 p.m., Monday  
26 through Thursday, and from 7:15 a.m. to 12:00 p.m. on Fridays; plaintiff attests that

---

27  
28 <sup>14</sup> Additionally, the Court notes that plaintiff has cited no evidence of Thai's age.

1 although Dr. Spina eventually agreed to a modified work schedule, he “did not give [her] the  
 2 Friday afternoons [she] needed off for appointments with [her] psychiatrists[.]” (See Keller-  
 3 McIntyre Decl. at 5.) As noted, plaintiff testified at her deposition that although she did not  
 4 tell Dr. Spina that her requested modified work schedule “was necessary because of a  
 5 psychiatric disability,” she made it clear to him that she was requesting the schedule  
 6 modification as “a disability accommodation.” (See Pl.’s App. Ex. 37 at 186:6-187:1.)

7 Accordingly, defendant’s motion for summary judgment with respect to plaintiff’s  
 8 disability discrimination claim will be denied to the extent such claim is based on a failure to  
 9 accommodate.

## 10 **2. Adverse Employment Action**

### 11 **a. Transfers To Positions with Fewer Responsibilities**

12 Plaintiff contends she was subjected to adverse employment actions because she  
 13 repeatedly was transferred, beginning with her June 2003 transfer to the Department of  
 14 Kinesiology, to positions with fewer duties and responsibilities than her prior position,  
 15 based, in each instance, on her disability. As noted, plaintiff relies on the expert opinion of  
 16 Dr. Barrett.<sup>15</sup> Dr. Barrett used the Yale University Clerical and Technical Position  
 17 Classification Program Questionnaire to conduct an analysis of plaintiff’s job duties and  
 18 responsibilities in her various positions at SFSU; based thereon, Dr. Barrett opines that  
 19 plaintiff’s position at the Department of Kinesiology had fewer job duties and responsibilities  
 20 than her prior position at CFSD, that her position at the CHHS had fewer job duties and  
 21 responsibilities than her prior position at the Department of Kinesiology, and that her  
 22 position at the SRC had fewer job duties and responsibilities than her prior position at the  
 23 CHHS. (See Supp. Opp. Ex. 41 at 11-26.)<sup>16</sup>

---

24  
 25 <sup>15</sup> As Dr. Barrett’s report is sworn, (see Supp. Opp. Ex. 41 at 44), defendant’s  
 objection to the report as hearsay is overruled.

26 <sup>16</sup> As noted, plaintiff’s expert, Dr. Barrett, concedes that plaintiff’s “title remained the  
 27 same for each job position at SFSU.” (See Barrett Decl. at 11.) Such circumstances do  
 28 not necessarily preclude a finding of an adverse employment action, however. See, e.g.,  
Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405, 2416-17 (2006)  
 (rejecting contention that no adverse employment action exists where “former and current

Although, as noted, defendants have articulated non-discriminatory reasons for such transfers, plaintiff has submitted sufficient evidence to raise a triable issue as to pretext, i.e., whether plaintiff's disability, and her request for accommodation thereof, were, in whole or in part, the motivation for such transfers.<sup>17</sup> In particular, plaintiff's transfer to the Department of Kinesiology occurred shortly after plaintiff requested that a partition be erected around her desk; although the partition was erected, plaintiff testified at her deposition that her supervisor, Dr. Rabolt, "opposed the screen." (See Pl.'s App. Ex. 37 at 122:1-11.) Additionally, plaintiff attests that Dr. Spina, plaintiff's supervisor at the Department of Kinesiology, opposed her requests for a change in work schedule to accommodate her disability, refused to give her the Friday afternoons off that she needed for appointments with her psychiatrists, and eventually requested that she be reassigned. (See Keller-McIntyre Decl. at 5-6.) With respect to her transfer from her position at the CHHS under Dziadur, to her position at the SRC under Katz, plaintiff attests that Dean Taylor and Dziadur "opposed [her] accommodation work schedule," even though "Gene Chelberg, Disability Director supported it." (See *id.* at 6.) Plaintiff further submits evidence that within days after she filed a charge with the EEOC, Dean Taylor berated her, called her a paranoid schizophrenic, and reduced her job duties. (See Keller-McIntyre Decl. at 8; Keller-McIntyre Supp. Decl. ¶ 2.)

Accordingly, defendant's motion for summary judgment with respect to plaintiff's disability discrimination claim will be denied to the extent such claim is based on the above-

---

job duties fall within the same job description"); *Ray v. Henderson*, 217 F.3d 1234, 1241 (9<sup>th</sup> Cir. 2000) (noting "transfer to another job of the same pay and status may constitute an adverse employment action").

<sup>17</sup> "[T]he ADA does not require that a discriminatory impetus have been the only motive for an adverse employment action." *Dark v. Curry County*, 451 F.3d 1078, 1084-85 (9<sup>th</sup> Cir. 2006) (emphasis in original). "Rather, the ADA outlaws adverse employment actions motivated, even in part, by animus based on a plaintiff's disability or request for an accommodation – a motivating factor standard." *Id.* (internal quotation and citation omitted; emphases in original).

1 referenced assertedly adverse employment actions.<sup>18</sup>

2 **b. Denial of Plaintiff's Request to Administer MBTI**

3 Plaintiff additionally contends she was subject to disability discrimination because  
 4 defendant refused to permit her to administer the MBTI to students, even though she  
 5 obtained the requisite qualification to do so. As discussed above, plaintiff has submitted  
 6 evidence that she completed the requisite coursework to administer the MBTI, but that she  
 7 nonetheless was told by Dean Taylor and Katz that she needed a degree in counseling.  
 8 (See Keller-McIntyre Decl. at 9.) Katz further attests, however, that he denied plaintiff's  
 9 request to administer the MBTI because "career counseling and similar assessment duties"  
 10 were his areas of responsibility and were not part of plaintiff's job. (See Katz Decl. ¶¶ 3-4.)  
 11 Plaintiff submits no evidence suggesting Katz's proffered reason is a pretext for disability  
 12 discrimination.

13 Accordingly, defendant's motion for summary judgment with respect to the above-  
 14 referenced claim for disability discrimination will be granted.

15 **C. Retaliation Claims**

16 Plaintiff alleges she was retaliated against, in violation of Title VII, the ADEA, and the  
 17 ADA, because she (1) initiated a grievance with respect to assertedly libelous commentary  
 18 contained in the spring 2003 report concerning Dr. Rabolt's performance as chairperson of  
 19 the CFSD, and (2) filed an EEOC complaint in the fall of 2005 based on the changes in her  
 20 job duties.

21 To demonstrate a prima facie case of retaliation, plaintiff must "put forth evidence  
 22 sufficient to show that (1) she engaged in a protected activity, (2) she suffered an adverse  
 23 employment action, and (3) there was a causal link between her activity and the  
 24 employment decision." See, e.g., Raad v. Fairbanks North Star Borough School District,

---

25  
 26 <sup>18</sup> Although, as noted, plaintiff further attests that, in December 2006, she was  
 27 placed on administrative leave despite her having submitted doctors' notes stating she was  
 28 able to perform her work, (see id. at 10), the Court has not considered such placement as  
 the basis of plaintiff's claims, as plaintiff has not sought leave to amend her complaint to  
 include such allegation.



323 F.3d 1185, 1196-97 (9<sup>th</sup> Cir. 2003); O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9<sup>th</sup> Cir. 1996). A “protected activity” consists of “oppos[ing] any practice made an unlawful employment practice” by any of the anti-discrimination statutes, or “ma[king] a charge, testif[y]ing, assist[ing], or participat[ing] in any manner in an investigation, proceeding, or hearing” with respect to such practice. See Raad, 323 F.3d at 1197; see also 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a).

Plaintiff’s complaints about the asserted libel do not constitute a protected activity, because libel is not an “unlawful employment practice” under Title VII, the ADEA, or the ADA. See Raad, 323 F.3d at 1197; 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a). Plaintiff’s filing of an EEOC complaint, however, does constitute protected activity, and plaintiff has submitted sufficient evidence to raise a triable issue as to whether she was transferred and her job duties reduced as a result thereof. In that regard, according to plaintiff, Dean Taylor called her into his office the day after she filed her EEOC complaint, berated her for an hour, and called her a “paranoid schizophrenic,” (see Keller-McIntyre Decl. at 8); two days after plaintiff filed her EEOC complaint, Katz requested permission from Dean Taylor to reduce plaintiff’s job duties, (see Katz Decl. ¶ 12); and seven days after plaintiff filed her EEOC complaint, Dean Taylor approved that request, (see Keller-McIntyre Decl. at 8; Pl.’s App. Ex. 31). “That an employer’s actions were caused by an employee’s engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision.” See Raad, 323 F.3d at 1197.

Accordingly, defendant’s motion for summary judgment with respect to plaintiff’s retaliation claim will be denied.

#### **D. Harassment Claims**

##### **1. Sex and Age Harassment**

Although defendant moves for summary judgment with respect to any claims based on an allegation that sex-based and/or age-based harassment constituted a hostile work environment, no such claims are alleged in plaintiff’s complaint, nor does she assert them

in her opposition. Nonetheless, to the extent plaintiff may be asserting such claims, she has failed to raise a triable issue of fact with respect thereto. The Ninth Circuit has held that the elements of a hostile work environment claim are: (1) the plaintiff was subjected to verbal or physical conduct of a sexual or age-related nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment. See, e.g., Vasquez v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2004) (citing Gregory v. Widnall, 153 F.3d 1071, 1074 (9th Cir. 1998)); Sischo-Nownejad v. Merced Community College District, 934 F.2d 1104, 1109 (9th Cir. 1991) overruled on other grounds, Dominguez-Curry v. Nevada Transportation Dept., 424 F.3d 1027, 1041 (9th Cir. 2005). The environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." See Farragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)). The plaintiff must show that the harassment occurred because of her sex and/or age. See Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998).

Here, there is no evidence of any verbal or physical conduct related to plaintiff's sex and/or age. Accordingly, the Court will grant defendant's motion for summary judgment with respect to any claim plaintiff may be asserting based on sex-based and/or age-based harassment.

## **2. Disability Harassment**

Although the Ninth Circuit has never determined whether a claim may be asserted under the ADA predicated on an alleged hostile work environment created by disability harassment, see Brown v. City of Tucson, 336 F.3d 1181, 1190 (9th Cir. 2003) (declining to decide issue), other circuits have held such a claim is cognizable, see, e.g., Flowers v. Southern Regional Physician Services, Inc., 247 F.3d 229, 232 (5th Cir. 2001). "[T]o succeed on a claim of disability-based harassment, the plaintiff must prove: (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3)

1 that the harassment complained of was based on her disability or disabilities; (4) that the  
2 harassment complained of affected a term, condition, or privilege of employment; and (5)  
3 that the employer knew or should have known of the harassment and failed to take prompt,  
4 remedial action.” See id. at 235-36. The harassment “must be sufficiently pervasive or  
5 severe to alter the conditions of employment and create an abusive working environment.”  
6 See id. at 236 (internal quotation and citation omitted).

7 Here, it is undisputed that plaintiff suffers from a disability, specifically,  
8 schizophrenia, and, as discussed above, plaintiff has submitted evidence that her  
9 supervisors expressed opposition to her requests for accommodation for her disability. For  
10 the reasons set forth below, however, plaintiff has failed to raise a triable issue of fact as to  
11 whether any such statements were “sufficiently pervasive or severe to . . . create an  
12 abusive working environment.” See id.

13 Courts are “to determine whether an environment is sufficiently hostile or abusive by  
14 looking at all the circumstances, including the frequency of the discriminatory conduct, its  
15 severity; whether it is physically threatening or humiliating, or a mere offensive utterance;  
16 and whether it unreasonably interferes with an employee’s work performance.” See  
17 Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998). Here, the behavior on which  
18 plaintiff primarily relies consists of employment decisions with which she disagreed, not  
19 physical or verbal conduct of a harassing nature. Moreover, there is no evidence that the  
20 assertedly harassing conduct occurred frequently. Plaintiff submits evidence that although  
21 Dr. Rabolt initially opposed the partition plaintiff requested, the partition nonetheless was  
22 erected. (See Pl.’s App. Ex. 37 at 122:1-11; Chelberg Decl. ¶ 5.) Further, there is no  
23 admissible evidence that Dr. Rabolt ever made any derogatory comments relating to  
24 plaintiff’s disability.<sup>19</sup> With respect to Dr. Spina, plaintiff submits evidence that plaintiff  
25 requested a reduced work schedule as an accommodation for her disability, that Dr. Spina  
26

---

27 <sup>19</sup> Indeed, even if the Court were to overrule defendant’s objection to plaintiff’s  
28 statement that Dr. Rabolt “mocked” the partition, there is no evidence that such words or  
other behavior, whatever they might be, occurred on more than one occasion.

1 strongly opposed that request, and that plaintiff thereafter “dropped” her request. (See  
 2 Keller-McIntyre Decl. at 5.) There is no evidence Dr. Spina, either at that time or at any  
 3 other time, made any derogatory comments relating to plaintiff’s disability. With respect to  
 4 Dziadur, plaintiff submits evidence that he “opposed [her] accommodation work schedule,”  
 5 (see Keller-McIntyre Decl. at 6), but submits no evidence of any derogatory comments by  
 6 Dziadur relating to plaintiff’s disability. With respect to Katz, plaintiff submits no evidence of  
 7 any comments about plaintiff’s disability. With respect to Dean Taylor, plaintiff submits  
 8 evidence that Dean Taylor “opposed [her] accommodation work schedule” during her  
 9 employment with Dziadur, and that approximately one year later, he called plaintiff a  
 10 “paranoid schizophrenic” during a meeting, (see Keller-McIntyre Decl. at 6, 8); there is no  
 11 evidence that Dean Taylor ever made any other arguably derogatory comments about her  
 12 disability. “[I]solated incidents (unless extremely serious) will not amount to discriminatory  
 13 changes in the ‘terms and conditions of employment’” sufficient to support a hostile work  
 14 environment claim. See Faragher, 524 U.S. at 788; see also Little v. Windermere  
 15 Relocation, Inc., 301 F.3d 958, 967-68 (9<sup>th</sup> Cir. 2002) (holding client’s rape of employee  
 16 sufficiently “serious” to support hostile work environment claim).

17 Accordingly, the Court will grant defendant’s motion for summary judgment with  
 18 respect to plaintiff’s claim of disability-based harassment in violation of the ADA.

### 19 CONCLUSION

20 For the reasons set forth above, defendant’s motion for summary judgment is  
 21 hereby GRANTED in part and DENIED in part as follows:

22 1. With respect to plaintiff’s sex and age discrimination claims, and claim of  
 23 retaliation for filing a grievance about libel, the motion is GRANTED.

24 2. With respect to plaintiff’s claim of retaliation for filing an EEOC charge, the motion  
 25 is DENIED.

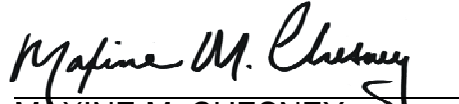
26 3. With respect to plaintiff’s disability discrimination claim, the motion is GRANTED  
 27 to the extent such claim is based on the denial of plaintiff’s request to administer the MBTI,  
 28 and DENIED in all other respects.

1           4. With respect to plaintiff's claim of harassment on the basis of sex, age, and/or  
2 disability, the motion is GRANTED.

3           This order terminates Docket No. 141.

4           **IT IS SO ORDERED.**

5           Dated: March 12, 2007

  
MAXINE M. CHESNEY  
United States District Judge